Filed 4/6/04 P. v. Maldonado CA2/5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. EDGAR ALEJANDRO MALDONADO, Defendant and Appellant.	B164931 (Los Angeles County Super. Ct. No. KA057093)

APPEAL from a judgment of the Superior Court of Los Angeles County, Bruce F. Marrs, Judge. Affirmed.

Laura G. Schaefer, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Robert F. Katz, Supervising Deputy Attorney General, Robert C. Schneider, Deputy Attorney General, for Plaintiff and Respondent.

I. INTRODUCTION

Defendant, Edgar Alejandro Maldonado, appeals from his conviction for attempted murder. (Pen. Code,[1] §§ 187, subd. (a), 664.) The jury also found: the attempted murder was willful, deliberate and premeditated; defendant personally and intentionally discharged a firearm; and defendant personally inflicted great bodily injury. (§§ 12022.53, subds. (b), (c) & (d), 12022.7, subd. (a).) Defendant argues the trial court improperly: denied his *Wheeler/Batson* motion; failed to sua sponte instruct the jury on voluntary manslaughter; admitted opinion testimony regarding defendant's possession and disposal of a gun; instructed the jury with CALJIC No. 2.06; and admitted gang evidence. Defendant further argues the cumulative effect of multiple errors require reversal of his conviction. We reject those contentions and affirm the judgment.

II. THE FACTS

In count 1, defendant was charged with the murder of Pablo Benitez along with various special allegations. Defendant, apparently on self-defense grounds, was acquitted of the charge of murdering Mr. Benitez who was himself armed at the time of the shooting. In count 2, defendant was charged with the premeditated attempted murder of Ramon Cazares, who was unarmed, along with various special allegations. As to count 2, defendant was convicted as charged.

We view the evidence in a light most favorable to the judgment. (*Jackson v. Virginia* (1979) 443 U.S. 307, 318-319; *People v. Osband* (1996) 13 Cal.4th 622, 690; *Taylor v. Stainer* (9th Cir. 1994) 31 F.3d 907, 908-909.) On March 9, 2002, Mr. Cazares closed his business, California Auto Repair, at 6:30 p.m. At approximately 9 p.m., Mr. Cazares, along with Mr. Benitez, Hilario Sanchez, Ricardo Llamas, and Juan Sanchez

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

were at the shop drinking and talking. Mr. Cazares and Mr. Benitez went to Rosa's Market nearby to buy some drinks. Mr. Cazares and Mr. Benitez encountered approximately five individuals inside the market. The men in the market began to argue with Mr. Benitez. One of the men, identified only as "Sammy," had been fighting with other individuals inside the store. The men were dressed like gang members and all had short hair. Mr. Cazares testified he told the men, "That we didn't want to fight." Mr. Cazares and Mr. Benitez began to walk back to the auto shop. The men began to follow and talk to Mr. Cazares and Mr. Benitez. Mr. Cazares turned toward the men and repeated that they did not want to fight. Defendant pulled out a gun and fired. Mr. Cazares heard eight or more shots. Mr. Cazares, who was unarmed, was shot seven times in his hips, legs, stomach, bladder, and back. Mr. Benitez was also shot and died of two gunshot wounds to the chest and abdomen. The bullets entered Mr. Benitez's back.

Mr. Cazares did not know defendant. Mr. Cazares had never seen defendant before the night of the shooting. The other individuals who accompanied defendant hung out across the street from Mr. Cazares's shop at the home of someone named "Alex," who was also known as "Toro." The person identified only as Alex was present on the night of the shooting. Prior to testifying at a prior hearing, the person identified only as Alex yelled to Mr. Cazares to come across the street. Mr. Cazares testified, "He told me . . . that there was someone on the phone that wanted to talk to me." While speaking on the telephone, Mr. Cazares was warned that he should not go to court. The caller also said that his "life" was in Mr. Cazares's hands. The individual also said Mr. Cazares would never see the caller again if he did not come to court. Mr. Cazares was nervous about testifying at trial. Mr. Cazares changed his residence because he was afraid something would happen to him or his family. Individuals who looked like gang members and who were unknown to Mr. Cazares had been looking for him at his home.

Rosa Martinez heard approximately five gunshots on March 9, 2002, around 9 p.m. Ms. Martinez had returned from a nearby drug store and was about to enter her home. Ms. Martinez lived in the third rear house across from the auto shop. Ms. Martinez ran

toward the street. Ms. Martinez saw the boys who routinely congregated in the parking area near her home running. There were several boys. All of them had their hair cut very short. Ms. Martinez knew two of the boys that lived there by the names of Alejandro and Andy. Alejandro was also known as "Toro." Ms. Martinez saw Mr. Cazares and Mr. Benitez lying in the street. Ms. Martinez helped Mr. Cazares into the auto shop. Mr. Cazares was bleeding from his leg and lower abdomen. Ms. Martinez laid Mr. Cazares down, put her jacket under his head, and called the police. Ms. Martinez did not see a gun in Mr. Cazares's possession that night. Ms. Martinez saw a gun underneath Mr. Benitez in his waistband.

Los Angeles County Deputy Sheriff Joseph Sheehy investigated the shootings. Deputy Sheehy showed Mr. Cazares several photographic lineups. Mr. Cazares was unable to identify anyone from the photographic lineups. However, on April 1, 2002, Mr. Cazares viewed a different photographic lineup. Mr. Cazares identified defendant's photo. Mr. Cazares was approximately 90 to 95 percent certain that defendant was the man who fired the shots. Mr. Cazares saw Mr. Benitez reaching for his waistband at the time of the shooting.

Deputy Sheehy interviewed defendant along with investigators from the El Monte Police Department. Defendant admitted he was a member of a local gang. Defendant consented to the search of his residence. The subsequent search did not reveal any handguns, casings, or bullets. Deputy Sheehy discussed the March 9, 2002, shooting with all the witnesses to the incident. As a result, Deputy Sheehy believed defendant had a gun on the night of the shooting.

Defendant's cousin, Nelly Reyes, testified that on March 9, 2002, she was at a birthday party. When Ms. Reyes arrived at the party at either 2 or 3 p.m., defendant was in his room. Defendant accompanied Ms. Reyes to have her son photographed at approximately 2 or 3 p.m. When they returned an hour and one-half later, Ms. Reyes dropped defendant off at his mother's residence. Ms. Reyes left to purchase some drinks. Ms. Reyes returned to the party and left again a few times over the evening. Ms. Reyes

finally left the party at approximately 9:30 p.m. Ms. Reyes testified that defendant was in his room at 9 p.m. However, Ms. Reyes did not personally see him there. On May 14, 2002, Deputy Sheriff William Gilbert supervised a court ordered preindictment lineup in defendant's case. Defendant refused to participate in the lineup.

III. DISCUSSION

A. Jury Selection

Defendant argues the trial court improperly denied his "*Wheeler/Batson*" motion. Defendant further argues 8 of the 13 peremptory challenges exercised by the prosecutor were used to excuse minority prospective jurors, including six Hispanic individuals and two Asians. During the course of voir dire in this case, defense counsel made a motion premised on *Batson v. Kentucky* (1986) 476 U.S. 79, 89 and *People v. Wheeler* (1978) 22 Cal.3d 258, 276-277 based upon the prosecutor's peremptory challenge of prospective juror No. 0126. (The record occasionally refers to prospective juror No. *0216.* But our review of the record reveals that she was actually prospective juror No. *0126* in seat No. 15.) The trial court denied the motion noting: "That motion will be denied on the evidence presented in the voir dire process based on all of the grounds submitted by this particular individual. It's clearly not a prima facia." Defense counsel responded, "*Wheeler* motion bias." Again, the trial court denied the motion and stated, "Not here in this case, not everything taken as a whole." Defense counsel asked that he be heard outside the presence of the jury. The trial court indicated it would hear defense counsel after "this portion of the trial."

Defendant renewed his *Wheeler/Batson* motion after the prosecutor's next peremptory challenge of prospective juror No. 0266. The trial court denied the motion, again noting that defense counsel would be heard shortly thereafter. Later the same day after the jury was seated, the trial court held proceedings outside the presence of the jury to

allow defense counsel to state his reasoning for the *Wheeler* motions. Defense counsel indicated that the prosecutor exercised 13 peremptory challenges. Defense counsel explained, "Out of those 13 challenges, eight were for people of color or people of minority background." Defense counsel continued: "I believe that is group bias, and I believe that is contrary to the principles under *Batson* and under *Wheeler*, and I would ask the court for a mistrial at this point." The trial court responded: "First, you articulated the last two ladies, one of them being a local State Senator and the other by my reading of it names [sic] appears to be Italian thus not one cognizable group. The other thing is as part of your cognizable group discussion we have a secondary factor, even assuming the court finds a cognizable group, the question is whether or not you have rebutted the presumption that the peremptory challenges were exercised on constitutional[ly] permissible grounds related to group bias and group association. [¶] I would only note that the State Senator told us that in 1988 her son was shot, [and the] Pomona [Police Department] failed to investigate. She was biased against [the] Pomona Police Department and it took a lot of questions to get her to even think about not conveying that bias against [the] Pomona Police Department to all policemen statewide. [¶] The second lady, what appears [to] be the Italian lady her, [*sic*] son was convicted of assault with a deadly weapon with great bodily injury as a juvenile in an adult prosecution for which she was taking antidepressive drugs. Her son is presently in jail, and she said it would be extremely hard for her to decide and thus on those two I don't find that you have made a prima fascia [sic] case as to rebut the inference. [¶] My recollection of the Asian group, the majority of them expressed that they had English language problems that also went to one. Latina ladies, number four, I recall her position being and my clerk pointed out to me [Code of Civil Procedure section 203, subdivision (a)(6)] which makes a juror legally ineligible to sit as a juror if he or she does not have sufficient English, and she claimed she did not. [¶] The Cambodian lady [prospective juror No. 3063] claimed she did not and the other jurors, as I recall, all had very clear reasons for not wanting to sit as a juror in our case but I'll let you augment the record, [defense counsel]. That was just my recollection of where we stand."

Defense counsel responded: "Yes, your Honor. Thank you. I think it would seem to me, your Honor, that the onus is on the People to justify why they are excluding people like 1205, 5734, 0266, 7976, 8903, 9634, 4768 and 6713. These are all basically, not Hispanic, but there are some Asians, there is what appears to be [an] Asian lady." The trial court inquired whether defense counsel was conceding prospective juror No. 0126. Defense counsel argued that prospective juror No. 0126 did not appear to be Italian, but that eight or at least six or seven people were excluded without "justification."

The California Supreme Court has held that the exercise of peremptory challenges to eliminate prospective jurors on the basis of race violates the state Constitution. (*People v. Williams* (1997) 16 Cal.4th 635, 662-663; *People v. Alvarez* (1996) 14 Cal.4th 155, 192-193; *People v. Turner* (1994) 8 Cal.4th 137, 164; *People v. Wheeler, supra,* 22 Cal.3d at pp. 276-277.) A defendant who contends the prosecution has excused prospective jurors for impermissible reasons, has the burden of establishing "a prima facie case of purposeful discrimination." (*People v. Williams*, *supra*, 16 Cal.4th at p. 663; accord, *People v. Mayfield* (1997) 14 Cal.4th 668, 723; *People v. Arias* (1996) 13 Cal.4th 92, 134-135.) The California Supreme Court has held that there is a presumption that a prosecutor uses peremptory challenges in a constitutional manner. (*People v. Boyette* (2002) 29 Cal.4th 381, 421-422; *People v. Alvarez*, *supra*, 14 Cal.4th at p. 193; *People v. Turner*, *supra*, 8 Cal.4th at p. 164; *People v. Clair* (1992) 2 Cal.4th 629, 652.) However, once a prima facie case is found, the burden shifts to the prosecution to show the absence of purposeful discrimination. (*People v. Alvarez*, *supra*, 14 Cal.4th at pp. 193, 197; *People v. Wheeler*, *supra*, 22 Cal.3d at pp. 281-282.) The California Supreme Court has held: "[A]dequate justification by the prosecutor may be no more than a 'hunch' about the prospective juror [citation], so long as it shows that the peremptory challenges were exercised for reasons other than impermissible group bias and not simply as a 'mask for race prejudice' [citation]." (*People v. Williams*, *supra*, 16 Cal.4th at p. 664; *People v. Turner*, *supra*, 8 Cal.4th at p. 165.)

The California Supreme Court has held, "The determination whether substantial evidence exists to support the prosecutor's assertion of a nondiscriminatory purpose is a 'purely factual question.'" (*People v. Ervin* (2000) 22 Cal.4th 48, 75; *People v. Alvarez, supra,* 14 Cal.4th at p. 197.) The trial judge's personal observations are critical to distinguishing bona fide reasons for the peremptory challenges from "sham excuses." (*People v. Boyette, supra,* 29 Cal.4th at p. 422; *People v. Jones* (1998) 17 Cal.4th 279, 294; *People v. Turner, supra,* 8 Cal.4th at p. 165 ["We give great deference to the trial court in distinguishing bona fide reasons from sham excuses".) The California Supreme Court has held: "Even seemingly '"highly speculative"' or "'trivial"' grounds may support the exercise of a peremptory challenge. [Citations.]" (*People v. Ervin*, *supra*, 22 Cal.4th at p. 77; *People v. Williams, supra,* 16 Cal.4th at p. 191; *People v. Walker* (1998) 64 Cal.App.4th 1062, 1067 [circumstances prompting the exercise of a peremptory challenge may often be subtle, visual, incapable of being transcribed, subjective, and even trivial].) Moreover, the California Supreme Court has held, "[P]rospective '[j]urors may be excused based on "hunches" and even "arbitrary" exclusion is permissible, so long as the reasons are not based on impermissible group bias.'" (*People v. Box* (2000) 23 Cal.4th 1153, 1186, fn. 6, quoting *People v. Turner, supra,* 8 Cal.4th at p. 165.) A prosecutor's reliance on a prospective juror's body language indicating a lack of attentiveness is, on appeal, a proper ground for affirming a judgment in the face of a *Wheeler* challenge. (*People v. Jones* (1997) 15 Cal.4th 119, 162, overruled on another point in *People v. Hill* (1998) 17 Cal.4th 800, 823, fn. 1; *People v. Turner*, *supra*, 8 Cal.4th at p. 171; *People v. Montiel* (1993) 5 Cal.4th 877, 909; *People v. Johnson* (1989) 47 Cal.3d 1194, 1219.) The Supreme Court has held: "Because *Wheeler* motions call upon trial judges' personal observations, we view their rulings with 'considerable deference' on appeal. [Citations.] If the record 'suggests grounds upon which the prosecutor might reasonably have challenged' the jurors in question, we affirm. [Citation.]" (*People v. Howard* (1992) 1 Cal.4th 1132, 1155, citing *People v. Sanders* (1990) 51 Cal.3d 471, 501; see also *People*

v. Johnson (2003) 30 Cal.4th 1302, 1325; *People v. Bittaker* (1989) 48 Cal.3d 1046, 1092.)

The California Supreme Court has held: "'"[W]hen a trial court denies a *Wheeler* motion without finding a prima facie case of group bias the reviewing court considers the entire record of voir dire. [Citations.] As with other findings of fact, we examine the record for evidence to support the trial court's ruling. Because *Wheeler* motions call upon trial judges' personal observations, we view their rulings with 'considerable deference' on appeal. [Citations.] If the record 'suggests grounds upon which the prosecutor might reasonably have challenged' the jurors in question, we affirm. [Citation.]"' [Citation.]" (*People v. Crittenden* (1994) 9 Cal.4th 83, 116-117, quoting *People v. Garceau* (1993) 6 Cal.4th 140, 171-172; *People v. Sanders, supra,* 51 Cal.3d at pp. 498, 501.)

Our review of the record on voir dire in this case supports the trial court's finding that no prima facie exclusion occurred and that there were grounds upon which the prosecutor might reasonably have challenged the jurors in question. (*People v. Crittenden, supra,* 9 Cal.4th at pp. 116-117; *People v. Garceau, supra,* 6 Cal.4th at pp. 171-172.) Prospective juror No. 0126 believed she knew the prosecutor from her son's preliminary hearing. Her juvenile son was prosecuted as an adult for an assault. Her son was now incarcerated. Prospective juror No. 0126 indicated that the burden of making a decision in this case would be very difficult for her because she had suffered from depression since her son's incarceration. She stated it would be an "emotional and psychological drain" to participate in this trial. Based on her name, the trial judge believed that this woman was Italian rather than a member of a cognizable group.

Prospective juror No. 0266 was a state senator. She indicated that her grandson had been shot by a gang member. Her grandson suffered from pancreatitis and diabetes as a result of his injuries. The Senator was unhappy with the way the Pomona Police Department handled the investigation of the shooting and no one was ever charged in that case. The Senator admitted she was prejudiced against law enforcement as a result of that incident. She had a strong prejudice regarding guns and voted against any legislation that

promoted guns. Moreover, she did not feel she could be fair or impartial in this case. She had read about police records being altered and, as a result, she did not know whether she would be completely trusting of any police officer. As the trial court noted, it was only after repeated questioning that she indicated she would be "as honest and fair as [she] could be."

Prospective juror No. 1205 stated, "No speak English very well." In answer to the basic questions asked of each juror, she responded: "I live in Pomona, I am married, two childrens, I have my house. My husband work in car dealers. My children's is in high school, one is in kindergarten, never jury experience. I work in the hospital in my country but I stay in my house. No military experience." Finally, prospective juror No. 1205 indicated she would need an interpreter to assist her during the trial. As the trial court noted, Code of Civil Procedure section 203, subdivision (a)(6), provides: "(a) All persons are eligible and qualified to be prospective trial jurors, except the following: [¶] . . . [¶] (6) Persons who are not possessed of sufficient knowledge of the English language . . . ."

Prospective juror No. 5734 stated that he had two high school friends that had been shot. He also had two good friends from high school that were in jail at the time of trial in this case. One of those individuals had a gun, stole some cars, and burglarized houses. Another female friend was involved in a first-degree murder. Both of these individuals had been very good students. Prospective juror No. 5734 stated that even good people break the law, but he would tend to think a student should be forgiven.

Prospective juror No. 7976 stated: her husband's car had been stolen and her house had been broken into twice; she was very biased because her son's friend was murdered; she did not want to be the one to judge someone in a murder case; her son had been a member of an Asian gang but was no longer affiliated with them; she felt someone might be looking for her son; three of her son's friends were murdered; and she did not know how the three murders would affect her judgment in this case. Defense counsel had requested that prospective juror No. 7976 be excused for cause. However, the trial court

stated, "While I agree [prospective juror No. 7976] is a loose cannon, but I don't think that is a challenge for cause, level of cannon."

Prospective juror No. 8903 was a full time veterinary student. Prospective juror No. 8903 stated she had a good friend who was in training to become a police officer. Prospective juror No. 8903 and a girlfriend had witnessed an abuse case and called the police. In a side bar conference, prospective juror No. 8903 stated that she was nervous, jittery, and shaking. She stated that she did not feel responsible enough as an 18-year-old to make a decision in this case. She indicated she had just returned home after completing stressful final exams. She stated that this jury experience was "nerve-wracking." Prospective juror No. 8903 stated that if she were left on the jury, "I would just be shaking all the time."

In response to the question, "In your profession, Sir, how do you feel about the charges against this young man here," prospective juror No. 9634 responded, "Bilingual." Thereafter, he stated, "I minister of Spanish speaking." When asked if he could listen only to the interpreter and not the witness for Spanish speaking witnesses, prospective juror No. 9634 responded, "I can read and listen to both." The record strongly suggests that this individual did not possess a sufficient grasp of the English language to adequately participate in the jury process. (Code Civ. Proc., § 203, subd. (a)(6).) More to the point, the trial court's implied conclusion there was a ground the prosecutor reasonably might have used to challenge prospective juror No. 9634 must by the compelling force of its inherent logic be upheld on appeal.

Likewise, prospective juror No. 4768 appeared to have difficulty with the English language and the requirement that he listen only to the interpreter assisting a witness. He also appeared to have a financial hardship. He stated, "My situation is my English is not really perfect and I know sometimes I misunderstand something and my situation right now I am working with a company who make a commission and I cannot really afford that. I am in a bad situation right now." When asked if he could listen only to the interpreter, prospective juror No. 4768 stated: "It is the same. You cannot stop thinking

what he is telling or trying to be persuade, hear what he says it translated. Sometimes I hear the translator is not really making the translation of what the witness is telling." He later answered affirmatively in response to the prosecutor's question whether anyone was having trouble understanding because of a language barrier.

Prospective juror No. 6713 indicated that he was a student on a school break who works to pay for books and tuition. The stepfather of Prospective juror No. 6713 was involved in a divorce. Prospective juror No. 6713 served as a "mediator" in the dispute because of a language barrier. (Prospective juror No. 6713 was not a lawyer.) Prospective juror No. 6713 did not feel his stepfather had been treated fairly by the "system." Prospective juror No. 6713 previously worked for a bankruptcy attorney and wanted to become a lawyer. He claimed he had been harassed by the police because he was a Mexican American and was biased against law enforcement as a result. One additional note is in order as to prospective juror No. 6713. The Attorney General argues that the parties stipulated to excuse juror No. 6713. But the trial court allowed each party to utilize their remaining peremptory challenges. The prosecutor elected to excuse prospective juror No. 6713, seated in seat No. 13.

The trial judge was in a position to determine from all the relevant circumstances whether the prosecutor peremptorily challenged these individuals based on their group association. Defense counsel did not provide any reason, other than the fact that the prospective jurors were either Hispanic or Asian, why he believed group bias motivated the prosecutorial exercise of peremptory challenges. In fact, defense counsel utilized peremptory challenges to exclude a Cambodian woman and a Filipino woman. In light of all the relevant circumstances, the trial court could properly find that defendant had not made a prima facie showing. (*People v. Boyette, supra,* 29 Cal.4th at p. 423; *People v. Crittenden, supra,* 9 Cal.4th at pp. 118-119; *People v. Garceau, supra* 6 Cal.4th at pp. 171-172; *People v. Sanders, supra,* 51 Cal.3d at pp. 498, 501.)

Typically, we would agree that the exercise of 8 of 13 peremptory challenges against members of racial minorities, assuming a cognizable group finding could be

returned, would constitute a prima facie showing and require the prosecutor to set forth the basis for such actions. But in this case, the unmistakable unsuitability of each of the foregoing prospective jurors is readily apparent. Each of the challenged jurors, for reasons that have nothing to do with nationality or heritage, should not serve on a jury trying the serious charges of a completed homicide and attempted murder arising out of firearm use. Under the circumstances, the trial court acted well within its discretion in concluding no prima facie showing had been made. If there were some subtlety or lack of clarity in the record as to the unsuitability of the jurors excused by the prosecution, the no prima facie showing finding made under these circumstances could be subject to question, assuming a cognizable group finding could be returned. But this is an extreme case of juror unsuitability for the type of charges at issue and a trial judge reasonably could find no prima facie showing had been made in the face of this record. Hence, defendant's contention that he is entitled to a reversal on *Wheeler-Batson* grounds is without merit. Finally, in terms of the *Wheeler-Batson* issue, there is no merit to defendant's argument that defense counsel was foreclosed from presenting any evidence or otherwise making a record to permit appellate review.

B. Opinion Testimony

1. Background

Defendant argues the trial court improperly admitted opinion testimony concerning the handgun used to shoot Mr. Cazares and Mr. Benitez. Two months after the shootings, defendant consented to a search of his residence. The premises searched included a defendant's makeshift bedroom that was constructed from a carport area of the house. On cross-examination, defense counsel emphasized the fact that nothing was found during that search to connect defendant to a homicide. Detective Sheehy acknowledged that he had not found any gun, bullets, spent casings, or bloody clothing in that room. On redirect, the

prosecutor repeated what was not found and inquired, "This was two months after the shooting, right?" Detective Sheehy acknowledged that it was. Detective Sheehy was then asked if he was surprised by that failure to locate any weapon. Detective Sheehy responded, "No." The prosecutor then asked, "Why not?" Defense counsel's relevance objection was overruled. Detective Sheehy responded, "The weapon that was used in the murder and the assault was probably disposed of." Defense counsel objected on the grounds of conjecture and speculation and moved to strike the detective's answer. The trial court overruled the objection. Thereafter, over defense counsel's relevance objection, Detective Sheehy testified that in his experience, individuals that commit a homicide usually do not retain the weapon they used in the murder.

On cross-examination, defense counsel repeated the questions regarding the lack of evidence found at defendant's house and emphasized Detective Sheehy's "assumption" that the weapon used in the shootings had been disposed of, "You are assuming he disposed of weapons without any type of proof, Sir, that he even had a weapon even at his house, is that correct?" To which Detective Sheehy responded, "Yes." On redirect, Detective Sheehy was asked, "And what was your basis for believing that the defendant shot [Mr. Benitez] and [Mr. Cazares] when you asked, assumed that he got rid of the weapon?" Defense counsel's relevance objection was overruled. A sidebar discussion followed in which defense counsel explained that the prosecutor was attempting to admit the testimony regarding the statements of Carlos Cruz, who was not expected to testify. In order to avoid any reference to information provided to Detective Sheehy by Mr. Cruz, the trial court instructed the prosecutor: "I would like to have you . . . lead him a little bit . . . to articulate the factors that he was considering in arriving at his opinion and his assumption that the gun was dumped." Thereafter, Detective Sheehy testified the opinion that the gun used in the March 9, 2002, shooting had been "dumped" was based on Mr. Cazares's statements and interviews with potential witnesses.

Defendant argues that Detective Sheehy's opinion regarding the probable disposal of the murder weapon amounted to conjecture rather than the proper subject of opinion

testimony. Defendant further argues the testimony was based upon unreliable hearsay. Finally, defendant argues the introduction of unreliable hearsay violated his federal constitutional rights to confront and cross-examine witnesses and a fair trial.

Defendant focuses in the opening brief on Detective Sheehy's general opinion concerning the disposal of firearms used in shootings by gang members. This aspect of Detective Sheehy's opinion relates solely to the general practice of gang members to dispose of firearms which had been discharged during the commission of crimes. Defendant adverts briefly in the opening brief to another, more fact specific aspect, of Detective Sheehy's opinions. At one point, Detective Sheehy expressed an opinion concerning whether defendant was armed on the night of the shooting of Mr. Cazares and Mr. Benitez. Also, Detective Sheehy expressed the view that the weapon *in this case* had been disposed of presumably by defendant or a cohort. We address each of these distinct issues separately. First, we discuss whether Detective Sheehy could express an opinion concerning general practices of disposing firearms used in crimes by gang members. Second, we will discuss whether Detective Sheehy could express the opinion that defendant was armed at the time the shooting and disposed of the weapon.

2. Detective Sheehy's general opinion concerning the disposal of weapons used in crimes by gang members

a. Constitutional claims

Preliminarily, defendant's constitutional claims posited for the first time on appeal concerning the admissibility of the foregoing evidence were not raised in the trial court and thus is the subject of waiver, forfeiture, and procedural default. (Evid. Code, § 353, subd. (a); *United States v. Olano* (1993) 507 U.S. 725, 731; *People v. Williams* (1997) 16 Cal.4th 153, 250; *People v. Vera* (1997) 15 Cal.4th 269, 274; *People v. Padilla* (1995) 11 Cal.4th 891, 971, overruled on another point in *People v. Hill, supra,* 17 Cal.4th at p. 823,

fn. 1; *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1116, fn. 20; *People v. Garceau, supra,* 6 Cal.4th at p. 173; *People v. Saunders* (1993) 5 Cal.4th 580, 589-590; *People v. McPeters* (1992) 2 Cal.4th 1148, 1174; *People v. Walker* (1991) 54 Cal.3d 1013, 1023; *People v. Ashmus* (1991) 54 Cal.3d 932, 972-973, fn. 10; *People v. Yarbrough* (1997) 57 Cal.App.4th 469, 477-478.)

b. Statutory claims concerning Detective Sheehy's opinion as to the disposal of the weapon

Defendant contends that Detective Sheehy's general testimony regarding the likelihood of the gun's disposal was not a proper subject of his expertise is not a ground for reversal. Evidence Code section 720 provides: "(a) A person is qualified to testify as an expert if he has special knowledge, skill, experience, training, or education sufficient to qualify him as an expert on the subject to which his testimony relates. Against the objection of a party, such special knowledge, skill, experience, training, or education must be shown before the witness may testify as an expert. [¶] (b) A witness' special knowledge, skill, experience, training, or education may be shown by any otherwise admissible evidence, including his own testimony." Evidence Code section 801 provides in pertinent part: "If a witness is testifying as an expert, his testimony in the form of an opinion is limited to such opinion as is: [¶] (a) Related to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact . . . ." (See also *People v. Valdez* (1997) 58 Cal.App.4th 494, 506; *People v. Torres* (1995) 33 Cal.App.4th 37, 45; *People v. Gamez* (1991) 235 Cal.App.3d 957, 965, overruled on another point in *People v. Gardeley* (1996) 14 Cal.4th 605, 624, fn. 10.) The California Supreme Court has explained: "California law permits a person with 'special knowledge, skill, experience, training, or education' in a particular field to qualify as an expert witness (Evid. Code, § 720) and to give testimony in the form of an opinion (*id.*, § 801). Under Evidence Code section 801, expert opinion testimony is admissible only if

the subject matter of the testimony is 'sufficiently beyond common experience that the opinion of an expert would assist the trier of fact.' (*Id.*, subd. (a).) The subject matter of the culture and habits of criminal street gangs, of particular relevance here, meets this criterion. (*People v. Olguin*[(1994)] 31 Cal.App.4th 1355, 1370 ['The use of expert testimony in the area of gang sociology and psychology is well established.']; *People v. Gamez* (1991) 235 Cal.App.3d 957, 965-966 [] [upholding the admission of opinion testimony by a gang expert]; *People v. McDaniels* (1980) 107 Cal.App.3d 898, 904-905 [] [same]; see *People v. Champion* (1995) 9 Cal.4th 879, 919-922 [] [holding that opinion testimony by an expert in juvenile gangs was relevant and therefore admissible].)" (*People v. Gardeley, supra,* 14 Cal.4th at p. 617; see 1 Witkin, Cal. Evidence (4th ed. 2000) Opinion Evidence, § 63, pp. 607-608 [practices of criminals may be the subject of opinion testimony].)

The California Supreme Court has held that as a general rule, a trial court has wide discretion to admit or exclude opinion testimony. (*People v. McDonald* (1984) 37 Cal.3d 351, 373, overruled on another point in *People v. Mendoza* (2000) 23 Cal.4th 896, 914; *People v. Haeussler* (1953) 41 Cal.2d 252, 261.) We review for abuse of that discretion. (*People v. Fudge* (1994) 7 Cal.4th 1075, 1115; *People v. Ashmus, supra,* 54 Cal.3d at p. 971; *People v. Bloyd* (1987) 43 Cal.3d 333, 357.) Detective Sheehy's testimony amply demonstrates his expertise in homicide investigations. Detective Sheehy had been a deputy sheriff for 22 years, he had been assigned to the homicide bureau for 2 years and had investigated 20 to 25 murders. In terms of whether Detective Sheehy's views could be the subject of admissible opinion testimony, no abuse of discretion occurred.

Further, defendant argues, "The detective's conjecture that appellant 'probably' disposed of the weapon, a common practice among murderers, was irrelevant because the jury could have arrived at this inference, if factually supported by admissible evidence, just as readily as the detective, without the benefit of the detective's 'expertise' in investigating homicide cases." We disagree. In *People v. Fudge, supra,* 7 Cal.4th at page 1121, the California Supreme Court held: "'"The jury need not be wholly ignorant of the subject

matter of the [expert] opinion in order to justify its admission . . . . [Expert testimony] will be excluded only when it would add nothing at all to the jury's common fund of information . . . ."'" (*Ibid.,* quoting *People v. McAlpin* (1991) 53 Cal.3d 1289, 1299-1300; *People v. McDonald, supra,* 37 Cal.3d at p. 367.) None of the jurors were gang members. Nor did any of the jurors expose any special knowledge of the conduct of gang members after a fatal shooting. Detective Sheehy's opinions could have assisted the jury in an area with which they were unfamiliar. Accordingly, the trial court's decision to admit Detective Sheehy's testimony regarding the routine disposal of murder weapons was not an abuse of discretion.

In addition, Detective Sheehy could testify on how he formed his opinion subject to the trial court's limitations. In *People v. Gardeley, supra,* 14 Cal.4th at page 619, the California Supreme Court held: "A trial court, however, 'has considerable discretion to control the form in which the expert is questioned to prevent the jury from learning of incompetent hearsay.' [Citation.] A trial court also has discretion 'to weigh the probative value of inadmissible evidence relied upon by an expert witness . . . against the risk that the jury might improperly consider it as independent proof of the facts recited therein.' [Citation.]" (*People v. Gardeley, supra,* 14 Cal.4th at p. 619, quoting *People v. Price* (1991) 1 Cal.4th 324, 416 and *People v. Coleman* (1985) 38 Cal.3d 69, 91.) In this case, the trial court spent considerable time at side bar with counsel regarding how Detective Sheehy's expertise could be established without revealing that there was a witness that would not testify. The trial court pointed out that Detective Sheehy's "assumption" that the weapon had been dumped was based upon his years in the department and expertise in the investigation of crimes and homicides would constitute an opinion. The trial court concluded that the prosecutor could question Detective Sheehy on whatever had been covered by other witnesses and the reasonable inferences that flowed from their testimony. That is exactly what the prosecutor did to elicit the basis of Detective Sheehy's belief that defendant had a gun on the night of the shooting. There was neither reference to or inference of inadmissible hearsay.

c. statutory claims concerning Deputy Sheehy's more fact specific opinion that defendant possessed a gun at the time the shooting and later disposed of the weapon

In the opening brief, it is briefly noted that Deputy Sheehy expressed the opinion defendant was armed on the night of the shooting and later disposed of the gun. No objection was interposed as to Detective Sheehy's opinion that defendant was armed on March 9, 2002. Accordingly, any objection to this narrow aspect of Deputy Sheehy's opinion testimony has been waived. (Evid. Code, § 353, subd. (a); *People v. Williams*, *supra*, 16 Cal.4th at p. 250.) Nevertheless, any error in connection with the admission into evidence of Detective Sheehy's opinions that defendant was armed on March 9, 2002, and the later disposal of the handgun was harmless. In order to reverse a judgment because of the erroneous admission of evidence, there must be reasonable probability of a different result at the error not occurred. (*People v. Heard* (2003) 31 Cal.4th 946, 978; *People v. Cox* (2003) 30 Cal.4th 916, 958.) The other evidence was overwhelming in terms of whether defendant was armed. No witness testified defendant was not armed at the time of the shootings. Detective Sheehy's other opinions concerning the general practice of disposing of handguns after crimes were perfectly proper. Therefore, Deputy Sheehy's challenged opinions concerning whether defendant was armed on March 9, 2002, and the disposal of the handgun were not matters of any probative moment.

C. Gang Association

Defendant argues the trial court improperly allowed the introduction of evidence of defendant's gang association. He further argues this evidence violated his federal constitutional right to a fair trial. Defendant does not specify what specific evidence was objectionable. Rather, he takes issue only with the trial court's ruling that gang evidence could be admitted.

Preliminarily, defendant's constitutional contention was not the basis of an objection in the trial court and thus is the subject of waiver, forfeiture, and procedural default. (Evid. Code, § 353, subd. (a); *United States v. Olano, supra,* 507 U.S. at p. 731; *People v. Williams, supra,* 16 Cal.4th at p. 250; *People v. Vera, supra,* 15 Cal.4th at p. 274; *People v. Padilla, supra,* 11 Cal.4th at p. 971, overruled on another point in *People v. Hill, supra,* 17 Cal.4th at p. 823, fn. 1; *People v. Rodrigues, supra,* 8 Cal.4th at p. 1116, fn. 20; *People v. Garceau, supra,* 6 Cal.4th at p. 173; *People v. Saunders, supra,* 5 Cal.4th at p. 590; *People v. McPeters, supra,* 2 Cal.4th at p. 1174; *People v. Walker, supra,* 54 Cal.3d at p. 1023; *People v. Ashmus, supra,* 54 Cal.3d at pp. 972-973, fn. 10; *People v. Yarbrough, supra,* 57 Cal.App.4th at pp. 477-478.)

Notwithstanding that waiver, we find no abuse of discretion in the admission of such gang evidence. Trial courts have broad discretion concerning the admission of evidence. (*People v. Anderson* (2001) 25 Cal.4th 543, 591; *People v. Smithey* (1999) 20 Cal.4th 936, 973-974.) Evidence Code section 352 provides: "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." The California Supreme Court has repeatedly held, "Rulings under Evidence Code section 352 come within the trial court's discretion and will not be overturned absent an abuse of that discretion. [Citations.]" (*People v. Minifie* (1996) 13 Cal.4th 1055, 1070; *People v. Rodrigues, supra,* 8 Cal.4th at pp. 1124-1125; *People v. Cudjo* (1993) 6 Cal.4th 585, 609; *People v. Hall* (1986) 41 Cal.3d 826, 834.)

Evidence of gang affiliations may be properly admitted when it is relevant to a question in issue, such as identity, bias, or motive. (*People v. Champion* (1995) 9 Cal.4th 879, 922; *People v. Sandoval* (1992) 4 Cal.4th 155, 175; *People v. Funes* (1994) 23 Cal.App.4th 1506, 1518-1519.) Moreover, the California Supreme Court has held evidence of a witness's fear of retaliation relates to credibility and is, therefore, admissible. (*People v. Malone* (1988) 47 Cal.3d. 1, 30; *People v. Olguin* (1994) 31 Cal.App.4th 1355,

1368.) The same is true of a witness's fear of testifying. (*People v. Warren* (1988) 45 Cal.3d 471, 481; *People v. Sanchez* (1997) 58 Cal.App.4th 1435, 1449-1450.) In this case, following a threatening phone call, Mr. Cazares failed to identify defendant at the preliminary hearing. Mr. Cazares had previously positively identified defendant as the person who fired the shots from a photographic lineup. There was evidence that defendant was in the company of several men with shaved heads that hung out in the neighborhood. Mr. Cazares and Mr. Benitez were followed out of a local grocery store after they had declined to fight with these men. The evidence in question was relevant to explain the reason these two men were shot. The trial court did not abuse its discretion in allowing the jury to evaluate defendant's gang associations.

D. Jury Instruction Issues

1. Attempted voluntary manslaughter

Defendant argues the trial court improperly failed to instruct the jury sua sponte on the lesser included offense of attempted voluntary manslaughter based upon an unreasonable belief in the need to use deadly force.[2] A trial court is obliged to instruct,

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[2] CALJIC No. 5.17 provides: "A person, who kills another person in the actual but unreasonable belief in the necessity to defend against imminent peril to life or great bodily injury, kills unlawfully, but does not harbor malice aforethought and is not guilty of murder. This would be so even though a reasonable person in the same situation seeing and knowing the same facts would not have had the same belief. Such an actual but unreasonable belief is not a defense to the crime of [voluntary] [or] [involuntary] manslaughter. [¶] As used in this instruction, an 'imminent' [peril] [or] [danger] means one that is apparent, present, immediate and must be instantly dealt with, or must so appear at the time to the slayer. [¶] [However, this principle is not available, and malice aforethought is not negated, if the defendant by [his] [her] [unlawful] [or] [wrongful] conduct created the circumstances which legally justified [his] [her] adversary's [use of force], [attack] [or] [pursuit].]"

even without a request, on the general principles of law which relate to the issues presented by the evidence. (§§ 1093, subd. (f), 1127; *People v. Wims* (1995) 10 Cal.4th 293, 303; *People v. Turner* (1990) 50 Cal.3d 668, 690; *People v. Grant* (1988) 45 Cal.3d 829, 847; *People v. Melton* (1988) 44 Cal.3d 713, 746; *People v. Flannel* (1979) 25 Cal.3d 668, 680-681.) When the evidence is minimal and insubstantial, there is no duty to instruct. (*People v. Barton* (1995) 12 Cal.4th 186, 196, fn. 5; *People v. Bunyard* (1988) 45 Cal.3d 1189, 1232; *People v. Flannel*, *supra*, 25 Cal.3d at p. 684; *People v. Mayberry* (1975) 15 Cal.3d 143, 151.) The California Supreme Court recently reiterated: "[T]he existence of '*any* evidence, no matter how weak' will not justify instructions on a lesser included offense, but such instructions are required whenever evidence that the defendant is guilty only of the lesser offense is 'substantial enough to merit consideration' by the jury. [Citations.] 'Substantial evidence' in this context is '"evidence from which a jury composed of reasonable [persons] could . . . conclude[]"' that the lesser offense, but not the greater, was committed." (*People v. Breverman* (1998) 19 Cal.4th 142, 162, quoting *People v. Flannel*, *supra*, 25 Cal.3d at p. 684, fn. 12, original italics, and *People v. Carr* (1972) 8 Cal.3d 287, 294; see also *People v. Birks* (1998) 19 Cal.4th 108, 118.)

In *People v. Lewis* (2001) 25 Cal.4th 610, 645, the California Supreme Court reiterated: "When the defendant killed in the actual but unreasonable belief that he or she was in imminent danger of death or great bodily injury, this is termed 'imperfect self-defense,' and the killing is reduced from murder to voluntary manslaughter. (*In re Christian S.* (1994) 7 Cal.4th 768, 771, 773 []; *People v. Barton* [(1995) 12 Cal.4th 186], [] 200-201.)" (*People v. Lewis, supra,* 25 Cal.4th at p. 645; see also *People v. McCoy* (2001) 25 Cal.4th 1111, 1116 [a person is guilty of attempted voluntary manslaughter where he or she attempts to kill in the unreasonable but good faith belief in having to act in self-defense]; *People v. Blakeley* (2000) 23 Cal.4th 82, 87-88 [same].)

At the time the trial court discussed jury instructions with the attorneys, defense counsel indicated he was not requesting CALJIC No. 5.17 be read to the jury. Instead,

defense counsel elected to request CALJIC No. 5.12,[3] justifiable homicide in self-defense. Defendant now argues that despite counsel's election to not request the instruction on imperfect self-defense, the trial court had a sua sponte duty to so instruct.

This case presents an unique scenario. There are two victims—Mr. Benitez, who was armed and shot to death, and Mr. Cazares who was unarmed and seriously wounded. The discussion of the attorneys and the trial court concerning self-defense instructions made no material distinction between Mr. Benitez, who was armed, and Mr. Cazares, who was unarmed. Further, the self-defense instructions draw no distinction between counts 1 and 2.[4] No doubt, Mr. Cazares testified that Mr. Benitez had a gun during the shooting.

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[3] CALJIC No. 5.12 was given as follows: "The killing of another person in self-defense is justifiable and not unlawful when the person does the killing actually and reasonably believes, one, that there is [imminent] danger that the other person will either kill him or cause him great bodily injury; and, two, that it is necessary under the circumstances for him to use in self-defense force or means that might cause the death of the other person, for the purpose of avoiding death or great bodily injury to himself. A bare fear of death or great bodily injury is not enough to justify a homicide. [¶] To justify taking the life of another in self-defense the circumstances must be such as would excite the fears of a reasonable person placed in a similar position, and the party killing must act under the influence of those fears alone. The danger must be apparent, present, and immediate, and instantly dealt with, or must so appear at the time to the slayer as a reasonable person, and the killing must be done under a well-founded belief that it is necessary to save one's self from death or great bodily harm."

[4] The jury was also instructed as follows concerning self-defense in conformity with CALJIC Nos. 5.12, 5.15, 5.50, 5.51, and 5.55: "Upon a trial of a charge of murder, a killing is lawful if it was justifiable or excusable. The burden is on the prosecution to prove beyond a reasonable doubt that the homicide was unlawful, that is, not justifiable, not excusable. If you have a reasonable doubt that the homicide was unlawful, you must find the defendant not guilty. A person threatened with an attack that justifies the exercise of the right of self-defense need not retreat. In the exercise of his right of self-defense a person may stand his ground and defend himself by the use of all force and means which would appear to be necessary to a reasonable person in a similar situation and with similar knowledge. A person may pursue his assailant until he has secured himself from danger if that course likewise appears reasonably necessary. This law applies even though the assailed person might more easily have gained safety by flight or by withdrawing from the scene. [¶] Actual danger is not necessary to justify self-defense. If one is confronted by

But there was *no* evidence defendant was aware Mr. Benitez was armed with a handgun. Further, Mr. Cazares never said Mr. Benitez reached for a gun. Ms. Martinez, who saw the shooting, did not see a gun in Mr. Benitez's hands during the shooting. She only saw the gun underneath Mr. Benitez, who was in the ground, in the left hip of his waistband. It is probable that without evidence from defendant as to what he observed that the self-defense instructions in this case were erroneously given as to count 1. As to count 2, the shooting of Mr. Cazares, the giving of self-defense instructions was error. There is no evidence Mr. Cazares engaged in any conduct which under the law of self defense would justify shooting him seven times. The same is true in terms of instructions on unreasonable self-defense.

No doubt, we agree with the following views expressed by our colleagues in Division Seven of this appellate district: "If the trier of fact finds the requisite belief in the need to defend against imminent peril, the choice between self-defense and imperfect self-defense properly turns upon the trier of fact's evaluation of the reasonableness of [the defendant's] belief. Accordingly, if the evidence is sufficient to support instruction on self-defense, it is also sufficient to support instruction on imperfect self-defense." (*People v. Viramontes* (2001) 93 Cal.App.4th 1256, 1262; *People v. Ceja* (1994) 26 Cal.App.4th 78, 90 (conc. opn. of Johnson, J.), disapproved on another ground in *People v. Blakeley, supra,* 23 Cal.4th at p. 92.) But as to Mr. Cazares, there was no basis for either self-defense or manslaughter based on an unreasonable belief in the necessity of using deadly force instructions.

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the appearance of danger which arouses, in his mind, as a reasonable person, an actual belief and fear that he is about to suffer bodily injury, and if a reasonable person in a like situation, seeing and knowing the same facts, would be justified in believing himself in like danger, and if that individual so confronted acts in self-defense upon these appearances and from that fear and actual beliefs, the person's right of self-defense is the same whether the danger is real or merely apparent. [¶] The right of self-defense is not available to a person who seeks a quarrel with the intent to create a real or apparent necessity of exercising self-defense." (See also fn. 3.)

The failure to instruct on a lesser included offense in a non-capital case is subject to California Constitution article VI, section 13 harmless error analysis. (*People v. Coddington* (2000) 23 Cal.4th 529, 593; *People v. Breverman, supra,* 19 Cal.4th at p. 165; *People v. Watson* (1956) 46 Cal.2d 818, 836.) Here, the trial court instructed the jury on murder, attempted murder, justifiable homicide in self-defense, self-defense, willful, deliberate and premeditated attempted murder, and alibi. There was no evidence that Mr. Cazares had a weapon. Rather, there was evidence Mr. Benitez had a gun in his waistband as he was being shot. Ms. Martinez testified that she did not see a gun in Mr. Cazares's possession during the shooting. Ms. Martinez saw a gun *underneath* Mr. Benitez in his waistband. The jury acquitted defendant in the murder of Mr. Benitez. No doubt, Mr. Benitez's possession of a gun influenced the jurors in determining that he was shot in self-defense. However, the jury had no evidence that Mr. Cazares possessed or used a gun on the night of the shooting. Ms. Martinez came to the scene immediately after the shots were fired. She did not see any gun in Mr. Cazares's possession. Moreover, the jury found that defendant's attempted murder of Mr. Cazares was willful, deliberate, and premeditated. That finding, coupled with the fact that Mr. Cazares was shot seven times, serves to refute any possibility that the jurors would have concluded defendant believed there was a need to shoot an unarmed victim. (See *People v. Coddington, supra,* 23 Cal.4th at p. 593; *People v. Earp* (1999) 20 Cal.4th 826, 886; *People v. Millwee* (1998) 18 Cal.4th 96, 157-158.) Any purported error was harmless.

2. CALJIC No. 2.06

Defendant argues the trial court improperly instructed the jury with CALJIC No. 2.06 as follows: "If you find that a defendant attempted to suppress evidence against himself in any manner, such as by the intimidation of a witness, this attempt may be considered by you as a circumstance tending to show consciousness of guilt. However, this conduct is not sufficient by itself to prove guilt, and its weight and significance, if any,

are for you to decide." The instruction was related to evidence that prior to defendant's preliminary hearing, Mr. Cazares was called to the phone by the person identified only as Alex or Toro. Alex lived across the street from Mr. Cazares's auto repair shop. Mr. Cazares spoke to the other person on the line. Mr. Cazares was instructed not to go to court. The speaker also said his life was in Mr. Cazares's hands. Defense counsel argued the instruction should not be given because the evidence did not support the fact that defendant was the one speaking on the phone to Mr. Cazares. The prosecutor argued that defendant was the only person that would benefit from Mr. Cazares's failure to testify. As noted previously, the caller indicated that his life was in Mr. Cazares's hands. The California Supreme Court has held: "[T]he cautionary language in [CALJIC No. 2.06] benefits the defendant by admonishing the jury of the limited use it may make of such potentially inculpatory evidence. [Citation.]" (*People v. Cash* (2002) 28 Cal.4th 703, 740 [instruction proper where defendant attempted to suppress evidence by simulation of a gun with his hand made at a court proceeding]; *People v. Jackson* (1996) 13 Cal.4th 1164, 1225.) The same is true in this case.

As noted previously, the jury was instructed that if it found defendant attempted to suppress evidence against him in any manner, then an adverse inference could be drawn against him. Further, the jurors were ordered consistent with CALJIC No. 17.31[5] to disregard inapposite instructions. The fact that the caller indicated that his life was in Mr. Cazares's hands suggested the caller was in fact defendant. If the jury reached that rationally based conclusion (defendant was the caller), then the prosecution most assuredly should receive the benefit of the damning inference to be drawn from his unsuccessful

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5 The jury was instructed consistent with to CALJIC No. 17.31 as follows: "The purpose of the court's instructions is to provide you with the applicable law so that you may arrive at a just and lawful verdict. Whether some instructions apply will depend upon what you find to be the facts. Disregard any instruction which applies to facts determined by you not to exist. Do not conclude merely because an instruction has been given that I am expressing an opinion as to the facts."

efforts to obstruct justice. But if the jurors could not reach that supposition, a thoroughly coherent deduction given the paucity of direct evidence defendant was the caller, then they are presumed to have earnestly obeyed the court's instructions not to draw the unpleasant inference resulting from the futile endeavor to suppress evidence. (*People v. Campbell* (1978) 87 Cal.App.3d 678, 685; *People v. Nunez* (1970) 7 Cal.App.3d 655, 662, fn. 2.)

F. Multiple Errors

Defendant argues that the cumulative effect of multiple errors requires reversal. We disagree. There has been no showing of cumulative prejudicial error. (*People v. Noguera* (1992) 4 Cal.4th 599, 649; see also *People v. Cudjo, supra,* 6 Cal.4th at p. 630 [no cumulative error when the few errors which occurred during the trial were inconsequential]; *People v. Garceau, supra,* 6 Cal.4th at p. 198; *People* v. *Clark* (1993) 5 Cal.4th 950, 1017.) Whether considered individually or for their cumulative effect, any of the errors alleged did not affect the process or accrue to defendant's detriment. (*People v. Sanders* (1995) 11 Cal.4th 475, 565; *People v. Cudjo, supra,* 6 Cal.4th at p. 637.) As the California Supreme Court has held, "A defendant is entitled to a fair trial, not a perfect one. [Citation.]" (*People v. Mincey, supra,* 2 Cal.4th at p. 454; *People v. Miranda* (1987) 44 Cal.3d 57, 123.) In this case, one of essentially uncontroverted evidence of guilt as to count 2, defendant received more than a fair trial.

IV. DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

TURNER, P.J.

We concur:

ARMSTRONG, J.

MOSK, J.